NG CHUAN HOCK A

v.

TAN SRI MUSA DATO HJ HASSAN & ORS

COURT OF APPEAL, PUTRAJAYA B
HISHAMUDIN MOHD YUNUS JCA
SYED AHMAD HELMY JCA
MOHD ZAWAWI SALLEH JCA
[CIVIL APPEAL NO: W-01-119-11-2011]
14 MARCH 2013 C

ADMINISTRATIVE LAW: *Rules of natural justice - Breach of - Dismissal - Disciplinary proceedings - Appellant dismissed from police force - Appellant asked to leave room when his witness was giving evidence before Investigation Committee - Whether appellant had knowledge as to what questions were put to his witness - Whether appellant had no opportunity to re-examine his witness - Whether a breach of natural justice - Public Officers (Conduct and Discipline) Regulations 1993, regs. 37(5) & 378B(3)* D

POLICE: *Disciplinary proceedings - Dismissal - Setting up of Investigation Committee to obtain further clarification - Proceedings of - Appellant asked to leave room when his witness was giving evidence - Whether appellant had knowledge as to what questions were put to his witness - Whether appellant had no opportunity to re-examine his witness - Whether a breach of natural justice - Public Officers (Conduct and Discipline) Regulations 1993, regs. 37(5) & 37B(3)* E F

The appellant was a chief inspector in the Royal Malaysian Police. A disciplinary proceeding was taken against the appellant under the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations'). The second respondent, the Disciplinary Authority of the Royal Malaysian Police ('Disciplinary Authority') met on 20 June 2007 and decided that an Investigation Committee ('the Committee') had to be set up under r. 37(5) of the 1993 Regulations for the purpose of obtaining further clarification. During the proceeding before the Committee, the appellant was asked to leave the room when it was the appellant's time to call his witness to give evidence. Thus, the appellant's witness gave evidence in his absence and no explanation was given by the Committee as to why the appellant was asked to leave the room. After considering the Committee's report and the appellant's representation, the Disciplinary Authority found the G H I

appellant guilty and dismissed him from the police force. Aggrieved by the decision, the appellant filed a judicial review application for an order of *certiorari* to quash the decision of the Disciplinary Authority. The High Court, however, dismissed the appellant's application and hence, this appeal. The issue that arose for consideration was whether there was a breach of natural justice during the Committee's proceeding when the appellant was asked to leave the room where the inquiry by the Committee was held.

Held (allowing appeal; setting aside decision of the High Court)

Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) Regulation 37(5) of the 1993 Regulation provides that if the Disciplinary Authority considers that a case against an officer requires further clarification, it may establish an Investigation Committee for the purpose of obtaining such further clarification. Further, reg. 37B(3) of the 1993 Regulations provides that if witnesses were called and examined by the Investigation Committee, the officer should be allowed to be present and to cross-examine the witnesses. (paras 10 & 11)

(2) It is elementary justice that the appellant must be present during the inquiry when his own witness was giving evidence. On the facts, there was a serious breach of the rules of natural justice when the appellant, for no apparent reason, was asked to leave the room when his own witness was giving evidence. Therefore, the appellant had no knowledge as to what evidence was given by his own witness. He also had no knowledge as to what were the questions that were put to his witness by the officer conducting the inquiry before the Committee during cross-examination. In addition to that, the appellant had no opportunity to re-examine his own witness which led to further injustice. (paras 24 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Perayu merupakan ketua inspektor yang telah bertugas dengan Polis DiRaja Malaysia. Satu prosiding tatatertib telah diambil terhadap perayu di bawah Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan 1993'). Responden kedua, Pihak Berkuasa Disiplin Polis DiRaja Malaysia ('Pihak Berkuasa Tatatertib') telah berjumpa pada 20 Jun 2007 dan memutuskan bahawa satu Jawatankuasa Penyiasatan ('Jawatankuasa')

perlu ditubuhkan di bawah per. 37(5) Peraturan 1993 bagi mendapatkan penjelasan lanjut. Semasa prosiding di hadapan Jawatankuasa, perayu telah diminta untuk meninggalkan bilik apabila sampai masanya untuk perayu memanggil saksinya memberi keterangan. Oleh itu, saksi perayu telah memberi keterangan dalam ketidakhadiran perayu dan tiada penjelasan telah diberi oleh Jawatankuasa berkenaan kenapa perayu telah diminta untuk meninggalkan bilik itu. Selepas mempertimbangkan laporan Jawatankuasa dan representasi perayu, Pihak Berkuasa Tatatertib telah mendapati perayu bersalah dan memecatnya daripada pasukan polis. Terkilan dengan keputusan tersebut, perayu telah memfailkan permohonan untuk semakan kehakiman bagi satu perintah *certiorari* untuk membatalkan keputusan Pihak Berkuasa Tatatertib. Mahkamah Tinggi walau bagaimanapun, telah menolak permohonan perayu dan oleh itu, rayuan ini. Isu yang dibangkitkan untuk pertimbangan adalah sama ada terdapatnya kemungkiran keadilan asasi semasa prosiding Jawatankuasa apabila perayu diminta untuk meninggalkan bilik di mana siasatan Jawatankuasa diadakan.

Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Peraturan 37(5) Peraturan 1993 memperuntukkan bahawa jika Pihak Berkuasa Tatatertib mempertimbangkan bahawa sesuatu kes terhadap seseorang pegawai memerlukan penjelasan lanjut, ia boleh menubuhkan sebuah Jawatankuasa Penyiasatan untuk memperolehi penjelasan lanjut sebegitu. Peraturan 37B(3) Peraturan 1993 pula memperuntukkan bahawa jika saksi-saksi dipanggil dan disoal oleh Jawatankuasa Siasatan, maka kehadiran pegawai itu mestilah dibenarkan supaya saksi-saksi boleh disoal balas.

(2) Ia adalah keadilan asasi perayu untuk hadir semasa penyiasatan apabila saksinya memberi keterangan. Berdasarkan fakta, terdapat pelanggaran serius keadilan asasi di mana perayu, tanpa sebarang sebab, telah diminta untuk meninggalkan bilik apabila saksinya memberi keterangan. Oleh itu, perayu tidak mempunyai pengetahuan berkenaan keterangan yang telah diberi oleh saksinya tersebut. Beliau juga tidak mempunyai pengetahuan berkenaan soalan-soalan yang dituju kepada saksinya oleh pegawai yang mengendalikan siasatan di

A hadapan Jawatankuasa semasa soal silang. Tambahan, perayu tidak mempunyai peluang untuk menyoal semula saksinya yang telah menyebabkan ketidakadilan selanjutnya.

Case(s) referred to:

B *B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC* ***(refd)***

Fauzilah Salleh v. Universiti Malaysia Terengganu [2012] 4 CLJ 601 HC ***(refd)***

Ganasan Marimuthu v. Public Services Commission & Anor [1998] 4 CLJ 331 CA ***(refd)***

C *Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC* ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC ***(refd)***

Legislation referred to:

D Public Officers (Conduct and Discipline) Regulations 1993, regs. 37(5), 37B(3)

For the appellant - Karpal Singh (Sangeet Kaur Deo with him); M/s Karpal Singh & Co

E *For the respondents - Suzana Atan; SFC*

[Appeal from High Court, Kuala Lumpur; Civil Suit No: R2-405-2010]

Reported by Kumitha Abd Majid

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JUDGMENT

Hishamudin Mohd Yunus JCA:

G **[1]** This is an appeal against the decision of the learned High Court Judge of Kuala Lumpur made on 28 January 2011.

[2] At the High Court, the appellant (Ng Chuan Hock) applied (by way of judicial review) for an order of *certiorari* to quash the decision of the second respondent (the disciplinary authority of the H Royal Malaysian Police) dismissing him from the police force after finding him guilty of three disciplinary charges.

[3] The learned High Court Judge had dismissed the appellant's judicial review application.

I **[4]** We had allowed the appeal. We shall now give our grounds.

Facts Of The Case

[5] Briefly, the facts are as follows. At the material time, the appellant was a Chief Inspector in the Royal Malaysian Police, stationed at the police headquarters, district of Yan, Kedah.

[6] By a letter of 13 July 2005, the appellant was notified by the Inspector-General of Police of a disciplinary proceeding against him under the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations'): there were nine charges against him. He was given 21 days to submit a written representation.

[7] By a letter of 9 August 2005, the appellant applied for an extension of time to submit his written representation. The appellant also applied to be supplied with certain documents to enable him to make his representation. The Inspector-General acceded to these requests.

[8] The appellant submitted his written representation to the disciplinary authority *via* his letter dated 11 March 2007.

[9] The disciplinary proceeding was carried out under the provisions of the 1993 Regulations. Part V of the 1993 Regulations sets out the procedure pertaining to the disciplinary proceeding against public officers.

[10] Sub-regulation (5) of reg. 37 provides that if the disciplinary authority considers that a case against an officer requires further clarification, it may establish an investigation committee for the purpose of obtaining such further clarification. The procedure to be followed by the investigation committee is provided for under reg. 37B of the 1993 Regulations.

[11] Sub-regulation (3) of reg. 37B provides that if witnesses are called and examined by the investigation committee, the officer should be allowed to be present and to cross-examine the witnesses. The exact wording of reg. 37B(3) of the 1993 Regulations is as follows:

> (3) If witnesses are called and examined by the Investigation Committee, the officer shall be given an opportunity to be present and to cross-examine the witnesses on his own behalf.

[12] The disciplinary authority met on 20 June 2007 and deliberated on the appellant's case. It decided that an investigation committee be set up under reg. 37(5) of the 1993 Regulations for the purpose of obtaining further clarification.

[13] The investigation committee sat on 22 and 23 April 2008. What had happened was that, during the proceeding before the committee, when the time came for the appellant to call his witness to give evidence before the committee, the appellant was asked by the committee to leave the room. Thus the appellant's witness gave evidence in the absence of the appellant. However, no explanation was given by the investigation committee as to why the appellant was asked to leave the room.

[14] Be that as it may, the investigation committee, after having concluded its inquiry, prepared and submitted a report to the disciplinary authority for the latter's consideration.

[15] By a letter dated 3 June 2010, the appellant was informed by the chairman of the disciplinary authority (the first respondent) that, after having considered the appellant's representation and the report of the investigation committee, the disciplinary authority arrived at a decision finding him guilty on three of the charges; and that the disciplinary authority further made a decision to dismiss him from the police force in relation to the first and third charges; and to issue him with a mere warning in respect of the ninth charge.

[16] Aggrieved by the decision of the disciplinary authority, the appellant applied to the High Court for judicial review. The application was dismissed.

Decision Of The High Court

[17] In dismissing the appellant's judicial review application, the learned High Court Judge, in her grounds of judgment, said:

> 10. In the present case regulation 37 contemplates that the officer will not cross examine his own witness. However, he has been given all the opportunities to represent his case at the hearing. From the facts of the present case the applicant had after been issued with a show cause letter on 13.7.2005 was granted two months at his own request, to make

his representation. Upon the retirement of Tan Sri Mohd Bakri Bin Hj Omar as the IGP, the first respondent took over the matter and had given opportunity to the applicant to check through all the required documents for him to present his case. He was in fact told to go to Pejabat Urus Setia Ketua Polis Negara (tatatertib) to inspect documents, which he did on 6.2.2007. He was asked to make an additional or fresh representation within 21 days. He instead sought an extension of another 10 days and finally delivered his representation on 11.3.2007. Pursuant to regulation 37(5), the Lembaga Tatatertib deliberated and decided to form a Jawatankuasa Penyiasat, to allow the appellant further evidence. The Jawatankuasa penyiasat which was supposed to deliberate on 8.4.2008 was again postponed to 9.4.2008 at the request of the applicant due to some problems with his witness. Given the conduct of the proceeding on the whole (see exhibit TSMH-10) it is clear that the applicant was afforded ample opportunity to present his case. Thus to my mind his absence during the time his own witness testifying is not fatal and cannot vitiate the finding of the disciplinary authority.

11. The rule of natural justice requires that an adjudicatory body should not make a decision adverse to a person without affording him effective opportunity or adequate opportunity of presenting his case. It is not a replica of the Court procedure. In *Lim Ko & Anor v. Board of Architects* [1966] 2 MLJ 80 the point was stressed that the Court should look closely at the form and not the substance and must not be looked at as if it is the proceeding of a Court. Having had all these tests in my mind and applying them to the present case I am of the view that there is no breach of the rule of natural justice by the Lembaga Tatatertib here as the facts disclose that the appellant had been given sufficient opportunity to present his case. In fact in *Najar Singh v. Government of Malaysia* [1976] 1 MLJ 203, the Privy Council had rejected a plea for an oral hearing under Article 135(2) of the Federal Constitution to be a denial of natural justice. Comparing it to the present case the applicant had been given all the opportunities and even oral hearing and the right to cross-examine witnesses called by the authority.

A **The Issue**

[18] The issue for us to consider in this appeal is whether there was a breach of the rules of natural justice when the appellant was asked to leave the room when the investigation committee
B was hearing the evidence of the appellant's witness.

Submission Of The Appellant

[19] In the present case, the contention of the appellant is that there was a breach of the rules of natural justice when he was
C asked to leave the room at the time when his witness (the witness whom he himself brought before the investigation committee) was giving evidence before the investigation committee. The learned counsel for the appellant, Mr Karpal Singh, submitted:

D > We respectfully state our abovementioned submission should find favour with this Court. Clearly evidence was taken behind the back of the appellant in clear violation of the *audi alteram partem* principle.

[20] Learned counsel referred to:

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(a) *Fauzilah Salleh v. Universiti Malaysia Terengganu* [2012] 4 CLJ 601; [2012] 2 AMR 303 and

(b) *B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14; [1962] 28 MLJ 169.
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[21] In the Privy Council case of *Surinder Singh Kanda*, it was held (at pp. 172-173 (MLJ)):

G > If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, L.C. in *Board of Education*
H > *v. Rice* down to the decision of their Lordships' Board in *Ceylon University v. Fernando*. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or
I > representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough.

Submission Of The Respondents

[22] Ms Suzana Atan, the learned Senior Federal Counsel, for the respondents, submitted that the learned High Court Judge was legally right when she decided that reg. 37 contemplates that the officer will not cross examine his own witness. Learned Senior Federal Counsel argued:

> We humbly submit that the appellant's absence during the time his own witness testified is not fatal and did not vitiate the finding of the disciplinary authority. As the witness is for or produced by the appellant to support his case, there is no issue of the appellant not being given the opportunity to cross-examine his witness as provided under sub-reg. 37B (3) of Regulations 1993. The appellant is not in any way prejudiced.

[23] The learned Senior Federal Counsel referred to the following cases:

(a) *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525;

(b) *Ganasan Marimuthu v. Public Services Commission & Anor* [1998] 4 CLJ 331; and

(c) *Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333.

Decision Of This Court

[24] In our judgment, with respect, we accept Mr Karpal Singh's submission that there was a serious breach of the rules of natural justice when the appellant, for no apparent reason, was asked to leave the room (where the inquiry by the investigation committee was held) when his own witness was giving evidence. The appellant, therefore, had no knowledge what evidence was given by his own witness to the investigation committee. He also had no knowledge as to what were the questions that were put to his witness by the officer conducting the inquiry before the investigation committee during cross-examination. And he had no opportunity to re-examine his own witnesses.

[25] In our judgment, by asking the appellant to leave the room, the investigation committee was hearing evidence 'behind the back' (to borrow the words used by the Privy Council in *Surinder Singh Kanda*) of the appellant. It is true that at the point of time when the appellant was asked to leave the room it is the appellant's own witness that was giving evidence, and not the complainant's witness. But as we see it, still, it is a case of hearing evidence and cross-examining the appellant's witness behind the back of the appellant. And there was the further injustice when the appellant was deprived of the opportunity to re-examine his own witness. It is elementary justice that the appellant must be present during the inquiry when his own witness was giving evidence.

[26] We, therefore, allowed the appellant's application for judicial review as per prayers (a), (b), (d), (e), (f) and (h). The order of the High Court is set aside. An order for *certiorari* to issue to quash the decision of the disciplinary authority.